CAAP-19-0000449

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

KEEP THE NORTH SHORE COUNTRY, Appellant-Appellant, v. BOARD OF LAND AND NATURAL RESOURCES, THE DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE D. CASE IN HER OFFICIAL CAPACITY AS CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES; AND NA PUA MAKANI POWER PARTNERS, LLC, Appellees-Appellees.	Civil No. 18-1-0960-06 JPC (Agency Appeal) APPEAL FROM THE FINAL JUDGMENT, filed MAY 23, 2019 FIRST CIRCUIT COURT HONORABLE JEFFREY P. CRABTREE, JUDGE

APPELLEES-APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND SUZANNE D. CASE'S ANSWERING BRIEF

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TABLE OF ACRONYMS

ITL	Incidental Take License
HCP	Habitat Conservation Plan
ESA	Hawai‘i Endangered Species Act
BLNR	Board of Land and Natural Resources
NPM	Na Pua Makani Power Partners, LLC
KNSC	Keep the North Shore Country
DLNR	Department of Land and Natural Resources
CCH	Contested Case Hearing
HO	Hearing Officer
LWSC	Low Wind Speed Curtailment
ESRC	Endangered Species Recovery Committee
DOFAW	Division of Forestry and Wildlife
USFWS	United States Fish and Wildlife Service
FOF	Findings of Fact
COL	Conclusions of Law
D&O	Decision and Order
ROA	Record on Appeal

APPELLEES-APPELLEES' ANSWERING BRIEF

I. INTRODUCTION

This case concerns an Incidental Take License ("ITL")[1] under the Hawai'i Endangered Species Act ("ESA")[2] for the construction of a wind turbine renewable energy facility in Kahuku, on the North Shore of O'ahu (the "Project"). The facility's construction would help Hawai'i achieve its goal of achieving 100% renewable energy, and would, over its twenty-year lifespan, eliminate approximately one million tons of carbon dioxide emissions when compared to producing the same electricity by burning oil.

Like other wind turbine projects, this one, proposed by Appellee Na Pua Makani Power Partners, LLC ("NPM"), poses the risk of incidental harm to ESA-listed species of wildlife, including the ōpe'ape'a, or Hawaiian hoary bat, due to the rotating blades during operation. As required by State and federal law, NPM therefore prepared a Habitat Conservation Plan ("HCP") in consultation with the State Department of Land and Natural Resources ("DLNR") Division of Forestry and Wildlife ("DOFAW"), the State DLNR Endangered Species Recovery Committee ("ESRC"), and the U.S. Fish and Wildlife Service ("USFWS"). The HCP used data from an existing wind project in the same area to estimate the number of ōpe'ape'a "takes" the Project would cause, and established measures to minimize and mitigate impacts on the ōpe'ape'a.[3]

In its thorough Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order ("D&O"), the Board of Land and Natural Resources ("BLNR" or the "Board") made extensive findings regarding the HCP's proposed minimization and mitigation measures. It ultimately approved the HCP and issued the ITL, subject to several special conditions. Appellant

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[1] As it applies to this case, "take" means to harm or kill endangered or threatened species of wildlife. HRS § 195D-2. Pursuant to HRS § 195D-4(g), the Board of Land and Natural Resources may, "[a]fter consultation with the Endangered Species Recovery Committee . . . , issue a temporary license as part of a habitat conservation plan to allow a take . . . if the take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

[2] The Hawai'i ESA is codified in HRS Chapter 195D. This project also requires an ITL under the federal ESA, the application for which was under review when the Board issued its decision in this case. 70 ROA v. 30 at 58.

[3] HRS § 195D-4(g)(1) requires that the applicant, "to the maximum extent practicable, shall minimize and mitigate *the impacts* of the take." (Emphasis added). The requirement thus focuses more on how the species is impacted by the taking and mitigation measures than just the quantity of the take.

Keep the North Shore Country ("KNSC") has appealed from the Board's decision but its arguments are meritless. The Board's D&O was supported by its thorough FOFs and COLs, and complied with due process. KNSC's arguments fail because:

1. The Board's decision that the HCP complied with Hawaii Revised Statutes ("HRS") Chapter 195D was fully supported by its thorough FOFs and COLs, and where the Board disagreed with the contested case hearing officer's proposed decision, it explained and supported its reasons for doing so.
2. Board Member Samuel "Ohu" Gon III ("Gon") was not disqualified from participating in the Board's decision due to his prior membership in the ESRC. State law establishes that no inherent conflict of interest exists, and in this case, there is no evidence that Gon was subject to any improper ex parte communications, that he prejudged the issues before the Board, or that he was biased in any way.
3. The Board's decision was not flawed by any improper political pressure or ex parte communications. First, KNSC waived this issue by failing to raise it before the Board. Second, the attempted ex parte communication by State Senator Lorraine Inouye was intercepted and handled appropriately by the Board. The record establishes that only one Board Member actually heard any improper substantive communication, and he recused himself from the proceedings.

As explained below, and as the Circuit Court correctly found, the Board's decision complied with HRS Chapter 91, protected KNSC's due process rights, and properly found that the HCP appropriately minimized and mitigated any anticipated harm to the ōpeʻapeʻa. For these reasons, and those more fully addressed below, this Court should affirm the Circuit Court's order affirming the Board's decision, subject to the Board's stated conditions.

II. STATEMENT OF THE CASE

A. Relevant Factual Background

The NPM Wind Energy Project is a proposed wind generating facility in Kahuku on the North Shore of Oahu.[4] 70 ROA v. 30 at 55-56 (FOF 38).[5] NPM initially proposed nine wind

[4] The Record on Appeal ("ROA") is cited as: [Docket No.] ROA Volume (v.) at [PDF page No.].

[5] KNSC has not challenged any of the Board's FOFs on appeal. "[F]indings of fact that are unchallenged on appeal are the operative facts of a case." *Kelly v. 1250 Oceanside Partners*, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006) (quoting *Robert's Hawaii School Bus, Inc. v.*

turbines but in response to state agency comments and public concern, reduced the number of turbines to eight but increased the height of the turbines to a range of 427 ft (130 meters) to 656 ft (200 meters). *Id.* at 56-57 (FOF 41, 44). The purpose of the project is to generate renewable wind energy, consistent with Hawaii's initiative to achieve 100% renewable energy. *Id.* at 57-58 (FOF 49). The Project is expected to eliminate about one million tons of carbon dioxide over twenty years. *Id.* at 124 (FOF 345).

Because the Project has the potential to result in incidental take of species listed under the ESA, an HCP and ITL are required. *Id.* at 58-59 (FOF 50, 52). The HCP and ITL must determine an expected level of "take" of each species and provide for mitigation to offset the expected take. *Id.* at 60 (FOF 55, 57). NPM's HCP was developed in consultation with the ESRC, DOFAW, USFWS, and the public. *Id.* at 50-52 (FOF 4-11). For the ōpeʻapeʻa,[6] NPM requested a total take of 51 bats over a 20-year term. *Id.* at 91 (FOF 196). The requested take was based on two tiered levels. *Id.* Tier 1 estimates a maximum take of 34 bats over the 20-year term, but because of the inherent uncertainty in the take estimates due to limited data, the HCP provides a second tier which authorizes a take of an additional 17 bats and requires further mitigation if the proposed minimization measures are not as effective as predicted. *Id.* at 60, 91 (FOF 57, 197).

NPM's anticipated take was based on data obtained from the adjacent Kahuku Wind Project on a per-turbine basis. *Id.* at 92 (FOF 199). The existing turbines at the Kahuku Wind Project range from less than a quarter mile from the NPM site, to a little over a mile. *Id.* (FOF 200). The HCP accounted for uncertainty regarding the accuracy of the observed takes at Kahuku by assuming there were two unobserved takes for every observed fatality. *Id.* at 93 (FOF 204-06). As required by the ESRC and other agencies, the HCP estimated the total take at an 80% statistical credibility level, meaning that NPM's estimated take is likely an over-estimate. *Id.* at 90-91 (FOF 191-93).

The Kawailoa Wind Farm, whose data regarding bat fatalities KNSC argues NPM should

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Laupahoehoe Transp. Co., 91 Hawaiʻi 224, 239, 982 P.2d 853, 868 (1999)). "Findings of fact . . . that are not challenged on appeal are binding on the appellate court." *Okada Trucking Co., Ltd. v. Bd. of Water Supply*, 97 Hawaiʻi 450, 458, 40 P.3d 73, 81 (2002).

[6] Although the HCP and the Board's FOFs, COLs, and D&O cover other endangered species for which there were projected takes, the issues on appeal relate only to the ōpeʻapeʻa. This brief therefore only discusses facts relevant to the ōpeʻapeʻa.

have used, is located on the other side of the Koʻolau mountain range from the NPM site, about 4.5 miles away. *Id.* at 94 (FOF 210). The Kawailoa Wind Farm is operated by the same company as the Kahuku Wind Project, but has a higher observed ōpeʻapeʻa take because of the higher level of bat activity at the leeward Kawailoa site than at the windward Kahuku site. *Id.* at 94-97 (FOF 211-225).

To lower the risk of ōpeʻapeʻa takes, the HCP provides for Low Wind Speed Curtailment (LWSC). *Id.* at 106 (FOF 268). Use of LWSC means that wind turbines are not used to generate power, and do not spin, below a specified "cut-in" wind speed. *Id.* at 106-07 (FOF 269). Research shows that the use of cut-in speeds above 5 m/s decreases bat fatalities by about 50%, but the research is inconclusive as to whether increasing cut-in speed from 5 to 6.5 m/s results in a significant difference in bat fatalities. *Id.* at 107-08 (FOF 272-73). The ESRC's 2015 "Bat Guidance Document," which constitutes "the best science currently available on how the potential impacts of wind farms on the ōpeʻapeʻa should be handled," *id.* at 52 (FOF 16), recommends a minimum cut-in speed of 5 m/s, increasing if the rate of bat take is higher than anticipated. *Id.* at 109 (FOF 277); 40 ROA v. 15 at 63 (Bat Guidance Document). NPM's HCP accordingly proposes a 5 m/s cut-in speed, with increases though adaptive management if the rate of bat take is higher than expected. 70 ROA v. 30 at 109 (FOF 277).

B. Relevant Procedural History

The ESRC held its first public meeting regarding the HCP on July 2, 2014. *Id.* at 51-52 (FOF 11). On March 30, 2015, the ESRC conducted a site visit to the NPM Project site, and on March 31, 2015, conducted a review of the draft HCP during the public comment period. *Id.*; 38 ROA v. 14 at 279-84, 314-20. At the ESRC's December 17, 2015 meeting, the Committee was informed about changes made to the draft HCP in response to public comments, including that "[t]he height of the turbines was increased from 156m to 200m . . . ." 38 ROA v. 14 at 327. At this meeting, the ESRC members requested further amendments to the draft HCP. 70 ROA v. 30 at 52 (FOF 12); 38 ROA v. 14 at 330. The revised HCP, which included the new maximum turbine height, was provided to the ESRC for its February 25, 2016 meeting at which the ESRC voted to recommend approval of the HCP. 16 ROA v. 3 at 10, 28. On February 25, 2016, following a motion by then-ESRC Committee Member Gon, the ESRC voted 7-0 to recommend that the Board approve the amended HCP. 70 ROA v. 30 at 52 (FOF 13); 38 ROA v. 14 at 337.

At a BLNR meeting on November 10, 2016, KNSC orally requested a contested case

hearing (CCH) and followed up with a written request. 16 ROA v. 3 at 264, 293-95. During this meeting, which KNSC's president attended, Board Member Gon disclosed that "he was briefly on the endangered species advisory committee that advises windfarm projects" and that "[h]e is no longer on that committee and this particular company and proposal was not one that he provided substantial input to." 16 ROA v. 3 at 264-56. There were no objections to Gon's involvement on the vote regarding whether to hold a CCH. *Id.* Over NPM's written objections, 72 ROA v. 31 at 271-82, the Board voted on December 9, 2016 to grant KNSC's petition for a CCH. 40 ROA v. 15 at 20-21. Prior to the vote on KNSC's petition, Gon stated: "when a habitat conservation plan is put together it has to pass the [USFWS] and the DLNR. The suggestion that the [HCP] is fatally flawed or inadequate[ly] researched its [sic] problematic in his mind." 40 ROA v. 15 at 20. Gon was one of three Board members voting against holding a CCH. *Id.* at 21.

The Board appointed a hearing officer ("HO"), and a two-day evidentiary hearing was held on August 7 and 8, 2017. 70 ROA v. 30 at 55 (FOF 31). On November 1, 2017, the HO recommended disapproval of the HCP, primarily because of perceived issues with the ōpeʻapeʻa. 66 ROA v. 28 at 545. Specifically, the HO recommended finding that the HCP failed to use the best scientific and reliable data by: (1) electing to use a 5 m/s cut-in speed instead of 6.5 m/s; (2) concluding that the height of the turbines would not have a direct impact on the take level; and (3) relying solely on the data from the Kahuku Wind Project. 66 ROA v. 28 at 542. The HO also proposed finding that the HCP failed to include meaningful mitigation measures regarding the ōpeʻapeʻa. *Id.*

The parties filed exceptions and responses to the HO's report with the Board. 70 ROA v. 30 at 55 (FOF 36). On January 12, 2018 the Board held a meeting to hear oral arguments. At the beginning of this meeting, BLNR Chair Case disclosed on the record that the Board had received a letter from State Senator Lorraine Inouye ("Senator Inouye Letter") and that the letter had been inadvertently distributed to the Board members, but that when Chair Case learned it had been sent out, she immediately asked the other Board members not to read the letter. 68 ROA v. 29 at 219. Chair Case confirmed that none of the Board members had in fact read the letter, *id.* at 219, and that "none of these Board members have had any communications with Senator Inouye about the content of – whatever she wanted to communicate." *Id.* at 221.

Following Chair Case's disclosure, Member Roehrig disclosed that he had received a call from a legislator talking to him impassionedly about a wind project and who was in favor of the

wind project. *Id.* at 219-20. As a result, Member Roehrig recused himself. *Id.* at 220. Member Yuen also disclosed that Senator Inouye had attempted to call him and had left a message with his wife stating that it was "in regard to the Kahuku wind farm," but that he had returned the senator's call and "immediately, before [they] engaged in any discussion, told her that [he] could not take any input on the matter, and that was the extent of the call." 68 ROA v. 29 at 221. Member Yuen did not recuse himself. *Id.* KNSC did not make any objections, move to disqualify any member, or ask to further question any of the members regarding Senator Inouye's communications. *Id.* at 221-22. On January 24, 2018, KNSC filed a public records request pursuant to HRS Chapter 92F seeking the Senator Inouye Letter, to which the Board responded by stating it did not maintain the records. 12 ROA v. 1 at 31.

Also at the January 12, 2018 Board meeting, KNSC orally moved to disqualify Gon, but solely on the basis of his prior membership on the ESRC. 68 ROA v. 29 at 222. Chair Case asked KNSC to file a written motion, and the hearing proceeded. *Id.* KNSC subsequently filed a written motion to recuse Gon. 70 ROA v. 30 at 7-13. Gon also filed a written disclosure. 70 ROA v. 30 at 36. In a March 23, 2018 minute order, the Board denied KNSC's motion. *Id*. at 39-43.

The Board issued its FOFs, Conclusions of Law (COL) and Decision and Order (D&O) on May 16, 2018, approving the HCP and issuing the ITL with a number of special conditions.[7] 70 ROA v. 30 at 47-146. The Board explained that its decision differed from that of the HO because: (1) the hearing officer did not give sufficient weight to the scientific expertise of the ESRC and Hawaii Division of Forestry and Wildlife (DOFAW); (2) the HCP properly relied upon the adjacent Kahuku wind farm in estimating the probable take of the ōpeʻapeʻa; (3) the current science did not support requiring a LWSC of 6.5 m/s; and (4) the protection of existing ōpeʻapeʻa habitat as a form of mitigation (which is included in the HCP) is supported by the consensus of scientific opinion. 70 ROA v. 30 at 49.

The Board made extensive findings regarding, among other things, the proposed 5 m/s LWSC, *id.* at 106-13 (FOF 268-96), why the Kahuku ōpeʻapeʻa take data is the most accurate comparison, *id.* at 92-99 (FOF 199-233), why the science does not support the idea that

[7] KNSC mistakenly asserts that only four Board members signed the Board's decision. OB at 7. The decision was in fact signed by five board members: Chair Case, and Members Gomes, Oi, Gon, and Yuen. 70 ROA v. 30 at 144-46 (Oi's signature appears on page 146). Member Downing did not concur and Member Roehrig was recused. *Id.* at 144-45.

increasing turbine height to 200m would substantially increase bat take, *id.* at 99-104 (FOF 234-258), and how the proposed habitat restoration at Poamoho Ridge is an appropriate method of mitigation, *id.* at 113-18 (FOF 297-319). The Board also included twelve special conditions in the ITL. *Id.* at 142-44. In addition to ten special conditions proposed by NPM (which included limiting the turbine heights to 173m), the Board also required NPM to: (1) contribute an additional $100,000 toward research on deterring bats, *id.* at 143 (Special Condition 8), and (2) use any additional commercially-available bat deterrent technology that becomes available at a reasonable cost. *Id.* at 143-44 (Special Condition 9).

KNSC appealed to the Circuit Court and filed its opening brief on August 21, 2018. 12 ROA v. 1 at 163-81. In its appeal, KNSC raised Senator Inouye's attempted communications as an objection for the first time. *Id.* at 179-80. NPM and the Board both filed answering briefs on October 1, 2018. *Id.* at 210-73. KNSC filed its reply on October 15, 2018. *Id.* at 265-74.

On April 10, 2019, the Circuit Court entered an order affirming the Board's decision. *Id.* at 275-83. The court ruled that: (1) the Board's findings that the HCP complied with HRS Chapter 195 were not clearly erroneous; (2) Gon was not disqualified from participating in the Board's decision; and (3) KNSC had failed to timely raise Senator Inouye's attempted communications and had therefore waived its objection, but that even on the merits of the argument, the limited contact was not sufficient to warrant reversal of the Board's decision. *Id.*

C. Relevant Constitutional, Statutory, and Administrative Provisions

Those constitutional, statutory, and administrative provisions relevant to this appeal are attached as Appendix A to this brief.

III. STANDARDS OF REVIEW

A. Judicial Review of Contested Cases

Judicial review of an agency's decision is governed by HRS § 91-14(g):

> Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial

evidence on the whole record; or
(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g).

B. Findings of Fact

An agency's findings of fact are reviewable under the clearly erroneous standard, but "[f]indings of fact . . . that are not challenged on appeal are binding on the appellate court." *Okada Trucking*, 97 Hawai'i at 458, 40 P.3d at 81.

C. Conclusions of Law

An agency's conclusions of law are reviewed *de novo. Kilakila 'O Haleakala v. Board of Land and Natural Resources*, 138 Hawai'i 383, 396, 382 P.3d 195, 208 (2016). "A conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." *Id.* (quoting *Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc.,* 121 Hawai'i 16, 25, 211 P.3d 74, 83 (2009)).

D. Board's Exercise of Discretion Regarding Disqualification Issues

An agency's exercise of discretion "will not be overturned unless 'arbitrary, or capricious, or characterized by . . . [a] clearly unwarranted exercise of discretion.'" *Id.* (quoting *Paul's Elec. Serv., Inc. v. Befitel*, 104 Hawai'i 412, 416-17, 91 P.3d 494, 498-99 (2004)).

IV. ARGUMENT

A. The Circuit Court Did Not Err in Finding that the Board's Decision Satisfied HRS Chapter 195D

On the merits of the Boards decision, KNSC first argues that the Board failed to support its legal conclusion that "NPM's HCP provides for minimization [of the impact on the ōpe'ape'a] to the maximum extent practicable as required under HRS § 195D-4." OB at 8. Specifically, KNSC takes issue with the Board's approval of the 5 m/s cut in speed instead of a 6.5 m/s cut-in speed, and its approval of the HCP's reliance on data from Kahuku Wind Project. *Id.* at 11-12. Second, KNSC argues that the Board erred in relying on the ESRC recommendations because – according to KNSC's erroneous assertion – the ESRC only considered a proposal with smaller wind turbine generators. These arguments are without merit.

i. KNSC fails to challenge dispositive FOFs

KNSC's arguments regarding the merits of the Board's Decision are fundamentally

flawed because KNSC fails to challenge *any* of the Board's dispositive factual findings. To challenge an agency's factual findings on appeal, Hawai'i Rule of Appellate Procedure 28(b)(4)(C) requires the appellant to either quote or reference the specific finding in its points of error. KNSC challenges none of the Board's FOFs in its points of error, OB at 8-9, or even in the rest of the brief. Factual findings that are not challenged on appeal must be accepted as correct by the reviewing appellate court. *See Tax Appeal of Cty. of Maui v. KM Hawaii Inc.*, 81 Hawai'i 248, 252, 915 P.2d 1349, 1353 (1996) ("The County has not challenged the Tax Appeal Court's FOFs and COLs . . . . Therefore, in addressing the County's arguments on appeal, we accept those FOFs and COLs as correct."); *Okada Trucking*, 97 Hawai'i at 458, 40 P.3d at 81 (holding that an agency's "[f]indings of fact . . . that are not challenged on appeal are binding on the appellate court.").

KNSC has thus waived any challenge to the Board's FOFs and these FOFs are now binding.[8] As explained in more detail below, this waiver is fatal to KNSC's arguments.

ii. The Board did not clearly err in finding that the HCP minimized impacts on the ōpe'ape'a to the maximum extent practicable

As an initial matter, the Circuit Court applied the correct standard of review. KNSC asserts that the Circuit Court erred by applying the "clear error" standard to "points of procedural errors." OB at 8. However, KNSC actually argues in this section that the Board failed to support its conclusion with facts establishing that the HCP provided for the minimization and mitigation of the impacts of the take on the ōpe'ape'a and that the Board erred in approving a 5m/s LWSC cut-in speed as opposed to 6.5 m/s. OB at 10, 11-12. As the Circuit Court recognized, these are plainly factual questions or at best mixed questions of law and fact, 12 ROA v. 1 at 279, which are subject to clear error review. *See Kilakila*, 138 Hawai'i at 396, 382 P.3d at 208. KNSC provides no explanation as to why these should be considered "procedural" issues subject to *de novo* review.

Moreover, contrary to KNSC's primary argument, OB at 11-12, the Board made numerous factual findings that supported its decision to approve the HCP's use of a 5 m/s LWSC as opposed to a 6.5 m/s LWSC. These findings included:

[8] The footnote in KNSC's brief to the Circuit Court, 12 ROA v. 1 at 167, wherein KNSC asserted that it does not waive its right to challenge certain findings of fact, does not change anything. KNSC neither raised any specific argument about those findings in its circuit court briefing, nor asserted any error as to those findings in its opening brief before this Court.

273. . . . Increasing cut-in speed from 5 to 6.5 m/s would increase the amount of time that turbine blades are not spinning or feathering. However, the studies are inconclusive as to whether there is a significant difference in minimizing bat fatalities when the cut-in speeds are increased from 5 to 6.5 m/s.

. . .

275. A study reported in Frontiers in Ecology and the Environment noted that contrary to prediction, there was no difference in bat fatalities between the 5.0 and 6.5 m/s treatments during either year of the study, and curtailment at 5.0 m/s proved to be far more cost effective. However, the authors found little differentiation in the amount of time different cut-in speed treatments were in effect, which may explain in part why they found no difference in bat fatalities between the two treatments.

. . .

277. DOFAW's December 2015 Endangered Species Recovery Committee Hawaiian Hoary Bat Guidance Document ("Bat Guidance Document") recommends "a minimum cut-in speed of 5.0 m/s, increasing to a higher cut-in speed through adaptive management if the rate of bat take is higher than initially expected." . . . . The proposal in the NPM HCP–that LWSC begin at 5.0 m/s, and that increases be considered through adaptive management if the rate of bat take is higher than initially expected–is what the Bat Guidance Document recommends.

. . .

288. LWSC at speeds between 5 m/s and 6.5 m/s has not been proven to be an effective means of significantly reducing bat mortality.

289. To require LWSC at 6.5 m/s at the outset of operations, rather than as a part of adaptive management, is not necessary to minimize and mitigate the impacts of the take of ōpeʻapeʻa to the greatest extent practicable.

. . .

291. The ESRC's approval of the HCP constitutes its expert and professional judgment that to require LWSC at 5 m/s, increasing if the rate of take exceeds expectations, is an appropriate condition consistent with the standards of an HCP.

292. Whether the NPM Project would experience significantly fewer ōpeʻapeʻa fatalities if it operated with LWSC at 6.5 m/s vs. 5 m/s is, on the current record, highly speculative. Kahuku, operating next door with a project of roughly similar scale, had one observed ōpeʻapeʻa fatality in three years with LWSC at 5 m/s. It cannot be known if it would have had zero observed take at 6.5 m/s.

. . .

> 294. Given the current state of knowledge, the practical difficulties of a 6.5 m/s LWSC, the modest scale of the estimated take, the tactic recommended by the ESRC in the Bat Guidance Document, and endorsed again in its recommendation of approval of the NPM HCP, is the right one: begin LWSC at 5 m/s, and if problems emerge, or research indicates better strategies, use adaptive management, which would include LWSC at higher speeds, longer seasonal restrictions, using higher LWSC at certain hours, or raise the speed taking certain weather factors into account.

70 ROA v. 30 at 108-13; *see also id.* at 108-11 (FOF 274-87, 293, 296).

As noted above, KNSC has not challenged any of these findings on appeal. Even if KNSC *had* challenged them, they are not clearly erroneous. Questions of fact and mixed questions of law and fact regarding scientific judgments are matters within the expertise of the Board. Such judgments "lie[] within the [agency's] designated expertise and sound discretion." *In re Water Use Permit Applications (Waiahole)*, 94 Hawai'i 97, 154, 9 P.3d 409, 466 (2000). "In deference to the administrative agency's expertise and experience in its particular field, the courts should not substitute their own judgment for that of the administrative agency." *Id.* (quoting *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984)).

Although KNSC offers no basis in the argument section of its opening brief as to why these findings are clearly erroneous, it suggests in the background section that the HCP's reliance on the 2009 Arnett study regarding LWSC was misplaced because "the dataset showed twice as many bats, six as opposed to three, were killed at a higher 6.5 m/s cut-in speed when compared with a cut-in speed of 5 m/s." OB at 3 (citing 24 ROA v. 7 at 243). This, however, only *supports* the Board's findings that 6.5 m/s was not shown to be necessary. The finding KNSC cites means that *more* bats were killed at the *higher* LWSC that KNSC asserts should have been adopted! The same Arnett study ultimately concluded that there was "no significant difference in [bat] fatalities between these two changes in cut-in speed." 24 ROA v. 7 at 253; *see also* 48 ROA v. 19 at 38 (a 2011 bat monitoring study noting that "Arnett . . . found no significant differences in bat casualty rates between turbines raised to 5.0 m/s and 6.5 m/s").

KNSC misleadingly attempts to portray this conclusion as being contrary to another study by the same researcher, which "demonstrated that raising cut-in speeds of turbines to between 5 – 6.5 m/s, or reducing rotor speeds on lower wind nights reduced bat fatalities between 57.5 - 82% over the course of a single fall migration season in Alberta and Pennsylvania, respectively." *Id.* (quoting 48 ROA v. 19 at 38). However, this finding is not contrary. It means exactly what it

says: that cut-in speeds of 5 – 6.5 m/s are effective in reducing bat fatalities by between 57.5 – 82%. It does not compare 5 and 6.5 m/s speeds or conclude that one is better, only that a range of 5 – 6.5 m/s is effective.[9]

KNSC's other arguments are equally unavailing. KNSC argues that the Board's findings supporting the conclusion that the higher 6.5 m/s cut-in speed would not be economically practicable, 70 ROA v. 30 at 109-110, 138 (FOF 278-286, COL 30-31), required more evidence. But, given that the Board's "primary reason[]" for accepting the 5 m/s cut-on speed was that the science did not establish that a 6.5 m/s cut-in speed was necessary, it was not even necessary for the Board to make these findings. 70 ROA v. 30 at 137 (COL 29). In any event, KNSC does not explain why more evidence was necessary, and fails to establish that the findings regarding economic practicability are somehow clearly erroneous. OB at 8-9, 11-12.

KNSC also misinterprets HRS § 195D-4(g)(1), arguing that it required the Board to find that "increasing curtailment to a cut-in speed of 6. 5 m/s would not decrease take of ōpeʻapeʻa[.]" OB at 11. HRS § 195-D-4(g)(1) does not require such a finding. It requires that "[t]he applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take." HRS § 195-D-4(g)(1). This does not, as KNSC seems to believe, require the HCP to minimize the *number* of individual bats taken to the maximum extent *possible*, but rather to minimize "the impacts of the take" to the maximum extent "practicable." *Id.*; *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 581 (D.C. Cir. 2016) (adopting the US Fish and Wildlife Service's interpretation that "[t]he determination of whether or not a project has minimized the impacts of the taking to the maximum extent practicable is a biological standard that considers *how the species is impacted* by the taking and mitigation, and *not just the quantity of take*" (emphasis in original)).[10] The Board found that NPM's HCP minimized and mitigated the impacts of the projected take of the ōpeʻapeʻa to the maximum extent practicable, 70 ROA v. 30 at 137-38 (COL 28-31), and that "[t]he proposed mitigation should more than offset the take of the

[9] This is further supported by looking at the data referred to in support of these conclusions. For example, data from the Pennsylvania facility showed a reduction in bat casualties of 77.5% with a cut-in speed of 5.0 m/s but a slightly lower reduction in casualties of 75% with a 6.5 m/s cut in speed. 48 ROA v. 19 at 38-39 (Table 29).

[10] The federal ESA counterpart to HRS § 195D-4(g)(1), 16 U.S.C. § 1539(a)(2)(B), is virtually identical, providing that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such a taking[.]"

ōpe‘ape‘a." *Id.* at 115 (FOF 309). Those conclusions are supported by the Board's unchallenged factual findings. *See, e.g.*, *id.* at 108-18 (FOF 273-96) (findings regarding cut-in speed), (FOF 301-19) (findings regarding the HCP's proposed restoration of existing ōpe‘ape‘a habitat at Poamoho Ridge).

The Board also did not err by relying on projected ōpe‘ape‘a take data from the Kahuku Wind Project. The HCP considered and reviewed data from other Hawai‘i wind projects such as Kawailoa, but consciously chose not to incorporate it. 70 ROA v. 30 at 96-97 (FOF 223-24). The Board made extensive factual findings regarding why it was appropriate to rely on the Kahuku data. *Id.* at 94-99 (FOF 210-233). These findings are summarized in FOF 225:

> The choice to use only Kahuku data, not Kawailoa, was proper because:
>
> a. Kahuku is immediately adjacent to NPM
>
> b. Kahuku is also on the windward side of the Ko‘olau Mountains; Kawailoa is more than four miles away on the leeward side.
>
> c. Kahuku has similar topography and vegetation. Snetsinger, WDT at ¶ 12.
>
> d. Kahuku has similar levels of bat activity to the NPM site.
>
> e. Kawailoa has a much higher level of bat activity than Kahuku, and hence higher projected take, than the NPM site.
>
> f. If Kawailoa data was included, there would have to be some weighting of the Kawailoa data vs. the Kahuku data. Any weighting – 50/20? 20/80? – would be arbitrary.

70 ROA v. 30 at 97 (FOF 225).

Again, KNSC has not challenged any of the Board's FOF's as clearly erroneous. Demonstrating that the Board carefully considered this issue, it even found that two of NPM's proposed reasons for not using the Kawailoa data – the difference in operating periods and the number of turbines – were not persuasive. *Id.* at 97-99 (FOF 228-232). The Board nevertheless found that despite these two reasons not being persuasive, "NPM still had ample justification for relying on Kahuku rather than including Kawailoa." *Id.* at 99 (FOF 232).

The Board's extensive factual findings are more than sufficient to support its conclusion that the HCP minimized impacts on the ōpe‘ape‘a to the maximum extent practicable and it is well within the Board's expertise to determine what constitutes the "best available scientific and other reliable data available." HRS § 195-21(b)(1). KNSC has not challenged any of these factual findings on appeal, and even if it had, they are not clearly erroneous.

iii. The Board did not clearly err in relying on the ESRC recommendations regarding wind turbine height

KNSC's arguments regarding the height of the proposed wind turbines, OB at 13-14, are meritless. First, KNSC ignores that NPM informed the ESRC of the increase in tower height and that the ESRC made its recommendations with full knowledge of the new maximum tower height of 200m. The minutes of the December 17, 2015 ESRC meeting explain how a DOFAW staff member described "changes from the public comment draft" including that "[t]he height of the turbines was increased from 156m to 200m . . . ." 38 ROA v. 14 at 327. In addition, the NPM's revised HCP, which included the new maximum turbine height of 200 m (or 656 ft), was provided to the ESRC for its February 25, 2016 meeting at which the ESRC voted to recommend approval of the HCP. 16 ROA v. 3 at 10, 28.

Second, the Board's extensive findings on this issue, 70 ROA v. 30 at 99-104 (FOF 234-58), support the Board's conclusion that the increase in wind turbine height did not make a substantial difference to the anticipated take. KNSC does not directly challenge any of these findings, instead arguing that the Board erred by "failing to consider wind turbine generator height . . . ." OB at 14. This is demonstrably wrong. The Board analyzed various studies relating to tower height and bat mortality, compared them to the heights at the existing Kahuku Wind Project and in NPM's proposal, and explained why the studies that found a difference in turbine heights probably did not apply to the ōpe'ape'a at the turbine heights NPM proposed. 70 ROA v. 30 at 100-02 (FOF 239-58). The Board concluded that

> [t]he scientific evidence introduced at the contested case hearing does not establish that there is a direct correlation between either height or rotor-sweep area and bat mortality at the heights of the NPM turbines. Even if there is, the conservative assumptions made by the NPM HCP would more than accommodate an adjustment based on the greater height and rotor sweep area of the NPM turbines vs. the Kahuku turbines.

Id. at 100 (FOF 238).

The Board plainly considered wind turbine generator height in determining whether the HCP was based on the best scientific and other reliable data available. KNSC neither challenges the Board's findings on this issue nor provides any grounds for concluding that the findings are clearly erroneous.

Finally, in continuing to belatedly object to the increase to a maximum wind turbine height of 200m, KNSC ignores Special Condition 12, in which the Board required that "the

Project shall include not more than eight wind turbines, with a maximum blade tip height of not more than 173 meters above pad elevation." 70 ROA v. 30 at 144. The HCP already employed "several conservative adjustments" to the Kahuku data, including "a 50% increase in the [anticipated take] number of bats that the analysis actually projected" and "using a ratio of two unobserved deaths for every observed death in the Kahuku data," *Id.* at 103-04 (FOF 252-54). The height limitation to 173m is a further conservative adjustment to ensure minimization of the impact on the ōpeʻapeʻa.

B. The Board Was Not Required to Disqualify Gon

i. KNSC's objection to Gon's participation was untimely

KNSC knew of Gon's prior membership in the ESRC and his involvement in wind farm projects on that committee at least by November 10, 2016, when Gon orally disclosed his prior membership on the ESRC. 16 ROA v. 3 at 264. Despite knowing this, KNSC waited until January 12, 2018, to make any objection to Gon's involvement. This objection was untimely and as a result, KNSC has waived it.

> *A party asserting grounds for disqualification must timely present the objection, either before the commencement of the proceeding or as soon as the disqualifying facts become known. See, e.g., Honolulu Roofing Co. v. Felix,* 49 Haw. 578, 615–16, 426 P.2d 298, 322 (1967); *Yorita v. Okumoto,* 3 Haw.App. 148, 152, 643 P.2d 820, 824 (1982); *Capitol Transp. Inc. v. United States,* 612 F.2d 1312, 1325 (1st Cir. 1979) ("Contentions of bias should be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist."). The unjustified failure to properly raise the issue of disqualification before the agency forecloses any subsequent challenges to the decisionmakers' qualifications on appeal.

Waiahole, 94 Hawaiʻi at 122–23, 9 P.3d at 434–35 (emphasis added).

Even though KNSC learned of Gon's prior membership on the ESRC at the November 10, 2016 Board meeting, it did not seek to question Gon further or make any objection to his participation in the decision whether to grant a CCH. 16 ROA v. 3 at 265. KNSC similarly made no objection or comment regarding Gon's participation when it subsequently filed its written petition for a CCH on November 19, 2016. *Id.* at 293-95. On December 9, 2016, when the Board voted whether to hold a CCH, KNSC's representative was present but again, KNSC made no objection or raised any issue regarding Gon's participation in the vote regarding the request for a CCH. 40 ROA v. 15 at 20-21.

It was not until *after* Gon's vote to deny KNSC's request for a CCH – a vote that could

be considered adverse to KNSC – and after the CCH evidentiary hearings, that KNSC made any objection to Gon's participation. This occurred on January 12, 2018. 68 ROA v. 29 at 222. KNSC's objection was untimely and was made by motion only after Gon voted adversely on its CCH petition. "Unless the matters of disqualification are unknown to the party at the time of the proceeding and are newly discovered, there can be no excuse for delaying the filing of the suggestion until after rulings are made in the matter, particularly where such rulings may be considered adverse to the movant." *Office of Disciplinary Counsel v. Au*, 107 Hawai'i 327, 338, 113 P.3d 203, 214 (2005).

KNSC attempts to justify its untimely objection to Gon's participation on the Board by asserting that Gon's initial disclosure did not state the full extent of his participation on the ESRC regarding the HCP. OB at 20. This does not excuse KNSC's untimeliness. Even if the Court were to accept that Gon's November 10, 2016 disclosure did not provide KNSC with sufficient information to object, the latest possible date that KNSC could have become aware that Gon had, as an ESRC member, moved for approval of the NPM HCP recommendation and voted in favor of it, was July 12, 2017. On that date, KNSC stipulated to introduce the minutes of the February 25, 2016 ESRC meeting into the contested case hearing record. 38 ROA v. 14 at 337. These ESRC minutes indicate that "Gon made a motion that the draft Na Pua Makani HCP be approved" and voted in favor of the approval. 38 ROA v. 14 at 337.

Despite this knowledge, KNSC waited another six months – until January 12, 2018 – before it raised any objection to Gon's participation.[11] The contested case proceeding was well under way by that point. The evidentiary hearing had been held, and the Board members, including Gon, had already spent time reviewing the contested case record. 68 ROA v. 29 at 261. Thus, even if this Court were to accept July 17, 2017 as the latest date that KNSC was aware of all the facts, KNSC's first objection came neither "before the commencement of the proceeding [n]or as soon as the disqualifying facts become known." *Waiahole*, 94 Hawaii at 122–23, 9 P.3d at 434–35. The objection was therefore untimely and was waived.

ii. The Circuit Court applied the correct standard

Even if this Court reaches the merits of KNSC's arguments regarding Gon's participation

[11] Nothing in the record indicates that KNSC learned anything new about Gon's participation on the ESRC between July 12, 2017 and January 12, 2018, so there is no reason KNSC could not have objected earlier.

(despite their untimeliness), KNSC's arguments are unavailing. KNSC's objection to the Circuit Court's application of HRS § 84-14 to the question of whether Gon was required to be disqualified is flawed. OB at 14-15. First, HRS § 84-14[12] plainly applies when determining whether a BLNR member should be disqualified; a fact that the Hawai'i Supreme Court has explicitly acknowledged:

> Like Yuen, Gon was appointed to the BLNR as a member with "particular qualifications" . . . . Like Yuen, Gon is statutorily prohibited from taking official action only where it "directly and specifically affects a business or undertaking in which [he] has a substantial financial interest." HRS § 84-14(a).

In re Conservation Dist. Use Application (In re TMT) HA-3568, 143 Hawai'i 379, 395, 431 P.3d 752, 768 (2018).

Second, the Circuit Court in fact considered, separately, whether there was any impartiality or prejudgment on Gon's part that would require disqualification. "Due process requires disqualification where 'circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on the adjudicator's impartiality.'" *Id.* at 393, 431 P.3d at 766 (quoting *Kilakila*, 138 Hawai'i at 425, 382 P.3d at 237). The burden of making such a showing falls on the party asserting impartiality. *Sifagaloa v. Board of Trustees of Employees' Retirement System of State of Hawai'i*, 74 Haw. 181, 192, 840 P.2d 367, 372 (1992).

Considering this issue, the Circuit Court explicitly relied on the fact that Gon stated he "was impartial and would consider all the evidence," and found that it was "not aware of any legal authority which prohibits an ESRC member from voting as a BLNR member." 12 ROA v. 1 at 280. The Circuit Court's order also plainly indicates that it considered the impartiality issue separately from whether Gon's participation violated the conflicts-of-interest statute for government employees (HRS § 84-14). *Id.* The Circuit Court ultimately found that KNSC had not "carried its burden on these recusal issues." *Id.* KNSC is therefore incorrect when it asserts that the Circuit Court incorrectly applied only the conflicts-of-interest standard under HRS § 84-14 to the issue of Gon's participation.

In any event, as explained more fully below, there is no basis for Gon's disqualification

[12] HRS § 84-14 governs conflicts of interests for government officers, and prohibits them from taking official action directly affecting "(1) A business or other undertaking in which the employee has a substantial financial interest; or (2) A private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity."

under the applicable standards.[13]

iii. Gon's participation did not violate HRS Chapter 91

KNSC's assertion that the Board's failure to disqualify Gon in light of his participation as an ESRC member violated HRS Chapter 91 is without merit.

First and foremost, the statutory scheme governing the Board and the ESRC explicitly allow the same individual to serve on both the ESRC and as a voting Board member. And the Hawai'i Supreme Court has affirmed that no inherent conflict of interest exists when one participates in an initial decision and then participates as a member of a board that subsequently reviews the initial decision or recommendation. *Liberty Dialysis, LLC v. Rainbow Dialysis, LLC, et al.*, 130 Hawai'i 95, 107-08, 306 P.3d 140, 152-53 (2013).

HRS § 195D-25(a) governs the composition of the ESRC. That statute provides that one of the members of the ESRC must be "the chairperson of the [BLNR] or the chairperson's designee[.]" HRS § 195D-25(a). The Board chairperson is also, of course, a voting member of the Board. *See* HRS § 171-4. Thus, HRS § 195D-25(a) specifically envisions the BLNR chairperson sitting on both the ESRC *and* the Board. This case does not involve the chairperson serving on the ESRC. But this does not change the fact the statutes plainly envision the same individual serving on both the ESRC and as a Board member.

The fact the Legislature plainly envisioned the same individual serving on both the ESRC and the Board should be dispositive as to KNSC's arguments here because it is precisely the same as the situation addressed by the Hawai'i Supreme Court in *Liberty Dialysis*. *Liberty Dialysis* involved the question of whether the State Health Planning & Development Agency (SHPDA) Administrator could serve on a SHPDA committee that (in a contested case proceeding) reconsidered the agency's approval of a certificate of need where the Administrator had also "substantially participated in making the decision or action contested." 130 Hawai'i at 96-97, 306 P.3d at 141-42. The appellant argued that a Department of Health administrative rule

[13] Even if this Court were to agree that the Circuit Court applied an incorrect standard, which it did not, it is well-established that "an appellate court may affirm a judgment of the lower court on any ground in the record that supports affirmance." *Canalez v. Bob's Appliance Serv. Ctr., Inc.*, 89 Hawai'i 292, 301, 972 P.2d 295, 304 (1999) (quoting *Gold v. Harrison,* 88 Hawai'i 94, 103 n. 7, 962 P.2d 353, 362 n. 7 (1998)).

governing contested case proceedings prohibited the Administrator from serving on the reconsideration panel. *Id*. at 103, 306 P.3d at 148. The Supreme Court, however, held that the administrative rule conflicted with a statute that "reflect[ed] the legislature's intent that the administrator participate in both the initial decision on the merits and the reconsideration decision." *Id.* at 104, 306 P.3d at 149. The Court therefore ruled that the administrator was not disqualified from the reconsideration committee despite making the initial decision that was under review. *Id.* at 108, 306 P.3d at 140.

Pursuant to *Liberty Dialysis*, there is no inherent conflict when an individual serves on an initial decision-making committee and also on a reconsideration panel, either as a matter of due process or of any inherent bias or appearance of impropriety. As the Court in *Liberty Dialysis* noted, when the legislature enacted the relevant statute, it "presumably was aware of prohibitions against conflict of interest for public officers and employees, *see* HRS § 84-14(a), and would not have intended that the administrator participate in a decision where such conflict existed." *Id.* at 108, 306 P.3d at 153. The Court further noted that the administrator remains subject to disqualification if he or she exhibits "bias or prejudice, or there is an appearance of impropriety." *Id.* n.20. Thus, an appearance of impropriety cannot be based solely on the fact an official serves on both an initial decision-making panel and a subsequent panel reviewing that decision.

Importantly, an interpretation of HRS §§ 91-9(g) or 91-13 – upon which KNSC relies –as precluding an individual who sat on a committee that makes an initial recommendation from sitting on a panel that reviews the initial recommendation, would directly conflict with the clear legislative intent in HRS § 195D-25(a) to allow the Board chairperson to sit on both. To the extent there is any conflict, the more specific statute, HRS § 195D-25(a), would govern. *See Richardson v. City & Cty. of Honolulu*, 76 Hawai'i 46, 55, 868 P.2d 1193, 1202 (1994) ("[W]here there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.").

In any event, nothing in the record suggests that Gon's participation violated HRS §§ 91-9(g) or 91-13. HRS § 91-9(g), which applies to "contested cases," provides that "[n]o matters outside the record shall be considered by the agency in making its decision except as provided herein." HRS § 91-13 provides:

> No official of an agency who renders a decision in a contested case shall consult with any person of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex

parte matters authorized by law.

KNSC points to statements Gon made at the January 12, 2018 hearing before the Board to suggest that Gon had already "formed an opinion on the meaning of 'best available scientific' information" and that he had "knowledge and consultation with sources outside the record." Clearly, these statements fail to establish that Gon's participation violated HRS §§ 91-9(g) or 91-13.[14]

First, all of Gon's comments identified by KNSC, *see* OB at 17-18, were made at the January 12, 2018 hearing, i.e., *after* the evidence was taken at the contested case hearing, *after* the hearing officer submitted her proposed FOFs, COLs, and D&O, and *after* the parties submitted their briefs to the Board. At the January 12, 2018 hearing, Gon also indicated that he had reviewed the contested case record. 68 ROA v. 29 at 261. It makes no sense to suggest that a Board member (or, for that matter, a judge) is prohibited from forming an opinion or an inclination about an issue *after* reviewing the evidentiary record and the parties' briefs but before a hearing.

Even though Gon stated, after KNSC moved to disqualify him, that as a general matter he "love[s] to chat with other [ōpe'ape'a experts] about . . . what we know and what we don't know about Hawaiian hoary bats," OB at 17 (quoting 68 ROA v. 29 at 260), this clearly was a general statement about his expertise rather than a specific comment about any communication or information he had obtained during the contested case proceeding. General knowledge gained *prior* to a request for a contested case hearing cannot be the basis for disqualification. HRS § 91-13 only applies to communications or consultations made *during* a contested case proceeding because it requires "notice and opportunity for all parties to participate." Simply put, Gon was not the recipient or a participant in any "ex parte communications" during the contested

[14] Aside from the fact that Gon did not consult any outside sources, the relief KNSC has sought under HRS §§ 91-9(g) and -13 is improper. The appropriate remedy for an official's consultation of outside sources under HRS §§ 91-9 and -13 is not disqualification, but an "opportunity to rebut whatever impressions the [official] may have formed . . . from sources outside the record." *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Hawai'i 217, 241, 953 P.2d 1315, 1339 (1998); *see also Mauna Kea Power Co., Inc. v. Board of Land and Natural Resources*, 76 Hawai'i 259, 263, 874 P.2d 1084, 1088 (1994) (allowing an objecting party "an opportunity to rebut [] *ex parte* communications" sufficiently cured any reliance on those communications). KNSC neither alleged that its opportunities to rebut Gon's statements were insufficient, *see* 68 ROA v. 29 at 222, 260-63; 70 ROA v. 30 at 7-12, nor sought additional opportunities to rebut Gon's statements. Instead, KNSC has improperly and single-mindedly sought Gon's disqualification.

case proceeding. As a practical matter, if Board members must be disqualified because of potentially relevant information they learn prior to a contested case proceeding in the normal course of their duties, serving as a Board member would be nearly impossible. For example, under KNSC's formulation of the law, any Board member who sat on the contested case hearing in the present case would be unable to sit as a Board member on any future wind farm project application because they would have been exposed to "relevant" information in this case.

Gon served on the ESRC because of his "expertise as a conservation biologist." 68 ROA v. 29 at 260. He has special expertise regarding, and has published articles on the ōpeʻapeʻa. *Id.* He was appointed to the BLNR for his expertise and knowledge in native Hawaiian culture and traditional and customary practices. 70 ROA v. 30 at 41. KNSC now essentially argues that Gon cannot participate in any case where his expertise is relevant because, according to KNSC, the existence of such background knowledge would violate HRS §§ 91-9 and 91-13. This simply is not the law and thus KNSC's argument must be rejected. *See, e.g.*, *Tangen v. State Ethics Comm'n*, 57 Haw. 87, 94, 550 P.2d 1275, 1280 (1976) ("A state would be hurt more than helped by a [conflict-of-interests rule] which in effect barred experts from serving on advisory boards." (Quoting approvingly 1 Harv. J. Legis. 68 (1974)); *Korean Buddhist Dae Won Sa Temple of Hawai'i*, 87 Hawaiʻi at 241-42, 953 P.2d at 1339-40 (holding that even where a decision-maker is exposed to outside sources *during* a contested case hearing, but does not rely on them in rendering a decision, there is no prejudice).

Second, KNSC objects to Gon's statement that returning the case to the ESRC would not "result in any . . . significant change in the information that has already been considered by the [ESRC] and by the state and federal agencies," OB at 17 (quoting 68 ROA v. 29 at 261). KNSC argues that this "indicates Gon's knowledge and consultation with sources outside the record and in violation of HRS § 91-9." *Id.* However, the ESRC proceedings were not "outside the record." The ESRC meetings were all public meetings subject to Hawaii's Sunshine Law, HRS Chapter 92, and all of the ESRC meeting minutes in regard to the HCP were submitted as exhibits in the contested case hearing and are part of the record. *See* 38 ROA 14 at 279-338. There is no reason that Gon – or any other Board member – could not conclude that the ESRC had already considered all necessary information based purely on a review of the record. Notably, KNSC provides no explanation as to why, if this statement was based only on Gon's involvement in the ESRC and not on the administrative record, he also noted that returning the case would not

change the information already considered by the other "state and federal agencies."[15] In short, this statement provides no basis to rule that Gon relied on matters "outside the record." KNSC's argument to the contrary is based purely on unfounded speculation.

Finally, KNSC's reliance on Gon's statement about ESRC's site visits not being in the record, OB at 17-18 (quoting 68 ROA v. 29 at 262), is also meritless. Far from a "specific[] descri[ption of] consultations and surveys that [Gon] engaged as part of the [ESRC]," OB at 18, Gon's statement was a generalized description of how the ESRC conducts site visits:

> [T] idea that the ESRC did not consider other turbine projects and other bats and the ramifications of that that on this particular case is probably erroneous. I mean, the fact that it doesn't show up in the HCP record kind of flies in the face of the fact that the ESRC went to visit as many of these projects in person to look at the areas that were being surveyed, to consider the records for each of those places, the different conditions and habitat, the – everything from the vegetation, to the wind, typical wind behavior, and the like in order to assess what was most appropriate to apply to this particular HCP.

68 ROA v. 29 at 262.

Gon's knowledge of the fact that ESRC conducts visits when reviewing HCPs was in no way improper. The ESRC's governing statute *explicitly requires* it to conduct a site visit of every project it considers:

> The endangered species recovery committee shall:
>
> (1) Review all applications and proposals for habitat conservation plans, safe harbor agreements, and incidental take licenses and make recommendations, based on a full review of the best available scientific and other reliable data *and at least one site visit to each property that is the subject of the proposed action*, and in consideration of the cumulative impacts of the proposed action on the recovery potential of the endangered, threatened, proposed, or candidate species, to the department and the board as to whether or not they should be approved, amended, or rejected[.]

HRS § 195D-25(b)(1) (emphasis added).

Moreover, contrary to KNSC's assertions, evidence of the ESRC's site visit to the NPM project was in the administrative record of this case. *See, e.g.*, 38 ROA v. 14 at 279-80, 282-84 (ESRC minutes describing in detail its site visit to the NPM project site).

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[15] As the Board found, "[t]he HCP was developed through consultation not only with ESRC, but also with DOFAW and the United States Fish & Wildlife Service ("USFWS"), species experts, other important stakeholders, and the public." 70 ROA v. 30 at 51 (FOF 11).

KNSC's interpretation of these comments – i.e., that Gon referred to multiple site visits conducted by the ESRC *in this case* that are not in the record – is simply wrong. But even if that interpretation were correct, it would not be a basis for Gon's disqualification because at most, Gon's statement would simply be a misstatement of the record. It is not disputed that the ESRC visited only the NPM project site in its considerations for this HCP. *See* 38 ROA v. 14 at 279-84. A statement by an administrative adjudicator (or a judge) about the record during oral argument cannot be a basis to invalidate the decision.

In short, the record establishes that Gon did not make or receive any ex parte communications or improperly consult sources outside of the record. The comments KNSC argues demonstrate he did so are either references to Gon's expertise and experience gained *before* a contested case hearing was even requested, or to information already available in the administrative contested case record. Nothing in these comments indicates that Gon had improperly prejudged the facts or issues prior to reviewing the evidence. As a result, they do not provide a basis to conclude that Gon's participation on the Board violated HRS §§ 91-9(g) or 91-13. Accordingly, the Circuit Court correctly ruled that Gon should not be disqualified.

iv. KNSC did not meet its burden of showing that Gon was required to be disqualified due to bias or prejudgment

"Administrative adjudicators are . . . entitled to a 'presumption of honesty and integrity.'" *In re TMT*, 143 Hawai'i at 393, 431 P.3d at 766 (quoting *Sifagaloa*, 74 Haw. at 192, 840 P.2d at 372). The test for prejudgment in an agency context is "whether a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law . . . in advance of hearing the matter." *Id.* (quoting *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 395, 363 P.3d 224, 243 (2015)). "[T]he test for disqualification due to the 'appearance of impropriety' is an objective one, based not on the beliefs of the petitioner or the judge, but on the assessment of a reasonable impartial onlooker apprised of all the facts." *State v. Ross*, 89 Hawai'i 371, 380, 974 P.2d 11, 20 (1998), as amended (May 25, 1999). And "the burden of establishing a disqualifying interest rests on the party making the assertion." *Sifagaloa*, 74 Haw. at 192, 840 P.2d at 372.

As previously discussed, there is no inherent bias or prejudgment problem created by the fact Gon voted as a member of the ESRC to recommend approval of the HCP and then also as a Board member to approve the HCP and issue the ITL. *See supra* Part IV.A.iii; *Liberty Dialysis*, 130 Hawai'i at 108, 306 P.3d at 140; *see also In re TMT*, 143 Hawai'i at 394-95, 431 P.3d at

767-68 (holding that Gon was not disqualified from voting on a Conservation District Use Permit (CDUP) application after Gon had previously voted in favor of approving the CDUP, which was later vacated on appeal).

"Administrators serving as adjudicators are presumed to be unbiased." *Sifagaloa*, 74 Haw. at 192, 840 P.2d at 372. At the January 12, 2018 hearing, Gon confirmed he understood his obligations when he stated that "[t]he idea of my ability to take in fresh information and provide for an opinion on this particular case is not in question," 68 ROA v. 29 at 261. He further addressed the issue in his written disclosure:

> I understand that my consideration of the issues as a member of the Board is to be based on the evidence in the record and the carious presentations to the Board considered in the light of my experience, training, and background. I am fully capable of considering issues before the Board based upon information presented during the course of public meetings and hearings, without prejudice or bias towards any result or party.

70 ROA v. 30 at 36.

Nothing KNSC raises overcomes the basic presumption that Gon would carry out his duties without bias. First, KNSC points to Gon's statement at the December 9, 2016 Board meeting, when the Board considered KNSC's request for a CCH, that "the suggestion that the that the [HCP] is fatally flawed or inadequate[ly] researched its [sic] problematic in his mind." OB at 20-21 (quoting 40 ROA v. 15 at 20). If KNSC believed this statement exhibited bias or prejudgment, it could – and should – have objected to it and Gon's participation at the time. But it did not. Although this statement was made on December 9, 2016, KNSC did not make *any* objection or even move to disqualify Gon until January 12, 2018, well over a year later (and only *after* Gon voted to deny KNSC's request for a CCH). 68 ROA v. 29 at 222. KNSC's objection to Gon's participation based on this statement was untimely. *See Waiahole*, 94 Hawai'i at 122–23, 9 P.3d at 434–35 ("A party asserting grounds for disqualification must timely present the objection, either before the commencement of the proceeding or as soon as the disqualifying facts become known."); *Au*, 107 Hawai'i at 338, 113 P.3d at 214 ("Unless the matters of disqualification are unknown to the party at the time of the proceeding and are newly discovered, there can be no excuse for delaying the filing of the suggestion until after rulings are made in the matter, particularly where such rulings may be considered adverse to the movant."); *In re Public Utilities Com'n*, 125 Hawai'i 210, 222, 257 P.3d 223, 235 (App. 2011) (17-month delay before raising a disqualification was untimely).

In any event, nothing about this statement demonstrates any apparent or actual bias. NPM objected to KNSC's request for a CCH and filed a lengthy opposition arguing against the request. 72 ROA v. 31 at 271-82. Gon was simply stating why he thought a CCH was unnecessary, which preceded his vote against holding a CCH. KNSC offers only speculation that Gon's vote against holding a CCH somehow biased his opinion going forward. However, "mere adverse rulings are insufficient to establish bias . . . even if erroneous." *Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) (quoting *Ross*, 89 Hawai'i at 380, 974 P.2d at 20 and *James W. Glover, Ltd. v. Fong*, 39 Haw. 308, 316 (Haw. Terr. 1952)).

Second, KNSC objects to Gon's statement that he was in a "good position" to determine whether evidence he heard from the CCH presented "new information." OB at 19 (citing 68 ROA v. 29 at 261-62). KNSC misinterprets this statement as resulting from Gon's "exposure to ex parte communications acquired while on the [ESRC]." OB at 19. As explained above, however, Gon did not engage in "ex parte communications" during his involvement on the ESRC because the ESRC process was completed before a CCH was even requested. More importantly, when read in context, Gon's statement – made immediately after he discussed his expertise and interest in the ōpe'ape'a – can only reasonably be read as a reference to the significance of that background expertise in relation to the question of whether evidence produced in the CCH genuinely raised new scientific information. *See* 68 ROA v. 29 at 260-62. Considering the issues "based on the evidence in the record . . . *in light of [his] experience, training, and background*" is exactly what Gon pledged to do in this case. 70 ROA v. 30 at 36 (emphasis added). The fact he verbalized his intention does not disqualify him.

KNSC provides nothing except speculation that Gon's participation on the ESRC caused him to impermissibly prejudge and render a biased opinion in the later Board decision. KNSC's objections to these statements are simply an attempt to object to the fact Gon was on both the ESRC committee that made the recommendation as well as the Board that reviewed the recommendation. As a matter of law, however, this cannot be a basis for Gon's disqualification. *See Liberty Dialysis*, 130 Hawai'i at 108, 306 P.3d at 140. As KNSC provides no other basis to question the propriety of Gon's participation, the Circuit Court correctly determined it had failed to meet its burden of showing that Gon should have been disqualified.

C. The Board's Decision Was Not Tainted by Political Pressure or Ex Parte Communications

At the outset of the Board's January 12, 2018 meeting, Chair Case disclosed on the

record that the Board had received a letter from Senator Lorraine Inouye and that the letter had inadvertently been distributed to the Board members, but that Chair Case had asked the other Board members not to read the letter. 68 ROA v. 29 at 219. Chair Case also stated that *none of the Board members* had read the letter or had any substantive communication with Senator Inouye. *Id.* at 219, 221. Even though there is no evidence to contradict these facts, and even though KNSC failed to raise any issue about this disclosure at the January 12, 2018 meeting or at any subsequent time to the Board, KNSC now improperly seeks to invalidate the ITL based on the letter. As an initial matter, KNSC has waived this issue by failing to properly raise it below. In any event, the argument is meritless.

i. KNSC has waived its arguments related to Senator Inouye

KNSC has waived its arguments related to Senator Inouye's Letter and telephone calls because it failed to raise them before the Board, even after Chair Case and the other members disclosed on the record exactly what had happened. KNSC improperly waited until *after* the Board issued its FOFs, COLs, and D&O (which was of course adverse to KNSC), and then only raised its objection in its appeal to the Circuit Court. The Circuit Court correctly ruled that KNSC's objection was untimely. 12 ROA v. 1 at 281.

"[T]he general rule that an appellate court will consider only such questions as were raised and reserved in the lower court applies on review by courts of administrative determinations so as to preclude from consideration questions or issues which were not raised in administrative proceedings." *Waikiki Resort Hotel, Inc. v. City & Cty. of Honolulu*, 63 Haw. 222, 250, 624 P.2d 1353, 1372 (1981). After Chair Case's disclosure, KNSC did not object to the participation of any Board member on the basis of Senator Inouye's letter or calls, only objecting to Gon's participation for unrelated reasons (*see supra*). 68 ROA v. 29 at 221-22. Nor did KNSC ask to question any of the Board members about the matter. *Id.* Even in its subsequent motion to recuse Gon, KNSC made no mention of any objection based on Senator Inouye's letter or calls. 70 ROA v. 30 at 7-13. Instead, KNSC waited until *after* the Board had issued its decision before first raising this issue in its appeal to the Circuit Court. The objection was therefore not timely raised and has been waived. *See Au*, 107 Hawai'i at 338, 113 P.3d at 214 ("Unless the matters of disqualification are unknown to the party at the time of the proceeding and are newly discovered, there can be no excuse for delaying the filing of the suggestion until after rulings are made in the matter, particularly where such rulings may be

considered adverse to the movant.").

KNSC incorrectly argues that it did not waive its objections because it requested the Senator Inouye Letter pursuant to an HRS Chapter 92F records request. This does not excuse KNSC from failing to raise any objection before the Board. The Board informed KNSC on January 29, 2018, that it could not provide the letter because it did not maintain a copy of it. 12 ROA v. 1 at 31. Between then and May 16, 2018, when the Board issued its FOFs, COLs, and D&O, KNSC did not pursue any further available avenues to obtain the letter, such as appealing to the Office of Information Practices under HRS § 92F-15.5 or filing a complaint under HRS § 92F-15 to compel disclosure. Even more importantly, KNSC failed to make any objection to the Board, even though, as it appears from its arguments on appeal, KNSC now believes the mere existence of the attempted ex parte communication by Senator Inouye was objectionable. *See* OB at 22.

KNSC attempts to characterize the Board's response to its HRS Chapter 92F records request as similar to the government, "[i]n the criminal context . . . suppressing or failing to disclose evidence favorable to a defendant . . . ." OB at 23. This comparison is inapt for many reasons, not least because here, the Board *did* disclose, on the record, the fact that attempted ex parte communications were made by a state senator. 68 ROA v. 29 at 219-21. The information disclosed by the Board was more than enough for KNSC to decide whether to object or to question individual Board members. It chose not to do so. Whether the Board was required to maintain the letter pursuant to HRS Chapter 92F is a separate issue that has no bearing on whether KNSC timely raised its objections to the Board.

ii. The Board was not subject to political pressure or ex parte communications

Chair Case stated on the record that none of the Board members had read Senator Inouye's letter. 68 ROA v. 29 at 219, 221. There is nothing in the record to contradict this representation. Member Yuen stated on the record that Senator Inouye had attempted to call him and had left a message with his wife stating that it was "in regard to the Kahuku wind farm," but that he had returned her call and "immediately, before [they] engaged in any discussion, told her that [he] could not take any input on the matter, and that was the extent of the call." 68 ROA v. 29 at 221. The only Board member who actually received any substantive external communication was Member Roehrig, who therefore recused himself. *Id.*

These facts are dispositive because there is "no evidence of the type of direct and focused

interference . . . with the decisionmakers" necessary to raise a due process concern. *Waiahole*, 94 Hawai'i at 124, 9 P.3d at 436. "[T]he proper focus is not on the content of communication in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process." *Id.* at 123, 9 P.3d at 435. In *Waiahole*, although the governor "made several general statements about his own views of the case" which "related directly to the dispute before the Commission [on Water Resource Management]," the governor's comments reached the Commission "indirectly . . . only through the . . . parties' objections." *Id.* As a result, there was no "nexus between the pressure and the actual decision maker" and the Court had "no choice but to presume that the Commission upheld its duty to decide the case without taking the governor's remarks into consideration." *Id.* at 124, 9 P.3d at 435.

Here, there was similarly no nexus because even though Senator Inouye attempted to contact the Board directly, the record shows that none of the Board members – other than Member Roehrig who recused himself – actually received any substantive communication from her or any legislator. There was thus no "relation between the communications and the adjudicator's decisionmaking process."

KNSC relies upon *Kilakila*, 138 Hawai'i at 382 P.3d at 195. However, all of the quotes KNSC relies upon, *see* OB at 23-24, come from the *dissenting opinion* in that case. KNSC conspicuously misrepresents this critical point.[16] The majority in *Kilakila* held that *no* impermissible ex parte communications with the BLNR had occurred. *Kilakila*, 138 Hawai'i at 398-402, 382 P.3d at 210-14.

In *Kilakila*, the plaintiff argued that "the Governor and Senator [Daniel] Inouye's offices exerted pressure on BLNR Chairperson Aila in order to attain approval of the [Advanced Technology Solar] telescope" on Haleakala, and that "BLNR failed to disclose these ex parte communications." *Id.* at 399, 382 P.3d at 211. This alleged pressure included a meeting

[16] KNSC even goes so far as to assert that "[i]n *Kilakila*, ex parte communications were required to be disclosed in order for 'a court to determine whether the discussion at the meeting constituted improper ex parte communications that could potentially invalidate the [subject] permit on due process grounds." OB at 25 (quoting *Kilakila*, 138 Hawai'i at 419, 382 P.3d at 231 (Pollack, J., dissenting)). This is completely wrong. KNSC again cites the dissenting opinion and again misleadingly represents this as being part of the Court's majority opinion. In *Kilakila*, the Court actually held that the alleged ex parte communications to which the dissent referred ***did not*** have to be disclosed by the Board. *See Kilakila*, 138 Hawai'i at 401, 382 P.3d at 213 ("[W]e cannot say that BLNR abused its discretion when it denied Kilakila's request [for the alleged ex parte communications].").

between the BLNR Chairperson, the Governor's office, the Attorney General's office, and Senator Daniel Inouye's office, *id.* at 393, 382 P.3d at 205, and a number of emails between the University of Hawai'i, the Governor's office, and Senator Daniel Inouye's office referencing a desire to expedite the contested case decision. *Id.* 394, 382 P.3d at 206. The Court, however, held that

> [w]hile the communications here concerned the permit approval process for the [telescope] and therefore "related directly to the dispute before" BLNR, we are not presented with evidence of communications relating to the merits that would constitute 'direct and focused interference' in BLNR's decision-making. In sum, we do not find that the political pressure placed on BLNR rose to the level of impropriety.

Id. at 400, 382 P.3d at 212 (quoting *Waiahole*, 94 Hawai'i at 124, 9 P.3d at 436) (citation omitted).

Here there is even less "evidence of communications relating to the merits that would constitute direct and focused interference." While there was arguably an *attempt* to make such direct communication, the fact the communication was intercepted before it was read or heard by any of the participating Board members means that like *Kilakila*, the attempted political pressure did not rise to the level of impropriety. KNSC's argument boils down to unfounded speculation that Senator Inouye's letter in fact influenced the Board's decision making despite the uncontroverted evidence that none of the Board members read the letter. Such speculation is not sufficient to taint the Board's decision. *See Waikiki Resort Hotel, Inc.*, 63 Haw. at 251, 624 P.2d at 1373 (holding that when letters submitted to the Building Board of Appeals were later withdrawn under objections and "the record does not show the exact contents thereof, nor is there anything in the record to show that the Board was influenced by those letters[,] . . . to say that the Board was influenced by those letters will be purely speculative").

The fact is many people – including legislators – wish to impart their views on the merits of issues before the Board. In the normal course, such input is provided appropriately and is in the record. For example, State Representative Sean Quinlan and State Senator Gil Rivere both testified before the Board in opposition to this project and prior to the Board granting the request for a CCH. 16 ROA v. 3 at 265. This type of communication from legislators clearly is not improper and does not taint the Board's decision. However, on occasion, individuals – including legislators – attempt to make improper contact with Board members on a contested case matter. The Board has little control over the actions of others. It can, however, take measures to ensure

such attempts do not interfere with the integrity of the Board's decision making. Such measures were taken here. When Chair Case realized the letter had been sent to the Board members, she immediately took action to ensure none would read it. Chair Case disclosed what happened on the record, which allowed the parties to voice any concerns or raise any objections. The one Board member who did receive a substantive communication – Member Roehrig – then recused himself from the proceedings. The Board dealt with the attempted communication efficiently and properly. An attempted *ex parte* communication that was not received by the sitting Board members, let alone shown to have influenced them, cannot be a basis to overturn the Board's decision. KNSC was not deprived of any due process, and this Court should affirm the Circuit Court's order.

V. CONCLUSION

For all of these reasons, this Court should affirm the Circuit Court's Order Affirming the Board's Decision and Order.

DATED: Honolulu, Hawaii, December 30, 2019

/s/ Ewan C. Rayner
EWAN C. RAYNER
Deputy Solicitor General

Counsel for Appellees BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, and SUZANNE D. CASE in her official capacity as Chairperson of the Board of Land and Natural Resources

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APPENDIX A

HRS § 91-9

Contested cases; notice; hearing; records. (a) Subject to section 91-8.5, in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

(1) The date, time, place, and nature of hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

(5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings and exceptions;

(5) Report of the officer who presided at the hearing;

(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein. [L 1961, c 103, §9; Supp, §6C-9; HRS §91-9; am L 1980, c 130, §1; gen ch 1985; am L 2003, c 76, §2]

HRS § 91-13

Consultation by officials of agency. No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law. [L 1961, c 103, §13; Supp, §6C-13; HRS §91-13]

HRS § 195D-2

Definitions. As used in this chapter:

"Aquatic life" means any type of species of mammal, fish, amphibian, reptile, mollusk, crustacean, arthropod, invertebrate, coral, or other animals that inhabit the freshwater or marine environment, and includes any part, product, egg, or offspring thereof, or freshwater or marine plants, including seeds, roots, and other parts thereof.

"Board" means the board of land and natural resources.

"Candidate species" means any species being considered by the United States Secretary of the Interior for listing as an endangered or threatened species, but not yet the subject of a proposed rule.

"Conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter and the Endangered Species Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, habitat acquisition and maintenance, propagation, live capture, law enforcement, and transplantation.

"Department" means department of land and natural resources.

"Direct payments" means governmental compensation of landowners for their discovery, care, maintenance, and recovery of endangered, threatened, proposed, or candidate species or their essential habitat.

"Ecosystem" means all natural elements, physical and biological, of the habitat or site in which any aquatic life, wildlife, or land plant species is found, and upon which it is dependent.

"Endangered species" means any species whose continued existence as a viable component of Hawaii's indigenous fauna or flora is determined to be in jeopardy and has been so designated pursuant to section 195D-4.

"Endangered Species Act" means the Endangered Species Act of 1973, 87 Stat. 884, or as such Act may be subsequently amended.

"Habitat banking" means a program that would allow a landowner, on whose property are found endangered, threatened, proposed, or candidate species or their essential habitat that would be impacted by a project being conducted on the property to purchase another property on which those affected species are found for the purposes of preserving those species as part of an approved habitat conservation plan.

"Indigenous species" means any aquatic life, wildlife, or land plant species growing or living naturally in Hawaii without having been brought to Hawaii by humans.

"Jeopardize the continued existence of an endangered or threatened, proposed, or candidate species" means any action that would be expected, directly or indirectly, to reduce the likelihood of the survival or recovery of the species in the wild, including the loss of genetic diversity of its populations where the species is a plant species.

"Landowner" means an owner of land or any estate or interest in that land when acting with the consent of the fee owner. In the case of government-owned lands, the consent shall be required of any government department or agency to which management or control of that land has been assigned.

"Land plant" means any member of the plant kingdom, including seeds, roots and other parts thereof, except freshwater or marine plants.

“License” means written permission by the department of land and natural resources to do a particular act or series of acts which without such permission would be unauthorized or prohibited.

“Natural communities” means a natural assemblage of plants or animals that occurs within certain elevation, moisture, and habitat conditions.

“Person” means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the federal government, of any state or political subdivision thereof, or of any foreign government.

“Private lands” mean lands that are not "public lands", as defined in this section.

“Proposed species” means any species that is the subject of a proposed rule for listing as an endangered or threatened species pursuant to the Endangered Species Act.

“Public lands” means lands owned by the federal government, the State, or a county, or lands owned by any political subdivision of the federal government, the State, or a county.

“Recovery” or “recover” means that the number of individuals of the protected species has increased to the point that the measures provided under this chapter or the federal Endangered Species Act are no longer needed.

“Species” means and shall include any subspecies or lower taxa of aquatic life, wildlife, or land plants.

“State marine waters” means all waters of the State extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary.

“Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct.

“Technical assistance program” means a program that includes department staff designated to assist landowners in developing, reviewing, or monitoring habitat conservation plans by providing technical assistance.

“Threatened species” means any species of aquatic life, wildlife, or land plant which appears likely, within the foreseeable future, to become endangered and has been so designated pursuant to section 195D-4.

“Wildlife” means any nondomesticated member of the animal kingdom, whether reared in captivity or not, including any part, product, egg, or offspring thereof, except aquatic life as defined in this section. [L 1975, c 65, pt of §1; am L 1983, c 111, §3; am L 1990, c 126, §6; gen ch 1993; am L 1997, c 380, §3; am L 2002, c 152, §1; am L 2003, c 35, §3; am L 2011, c 147, §2]

HRS § 195D-4

Endangered species and threatened species. (a) Any species of aquatic life, wildlife, or land plant that has been determined to be an endangered species pursuant to the Endangered Species Act shall be deemed to be an endangered species under this chapter and any indigenous species of aquatic life, wildlife, or land plant that has been determined to be a threatened species pursuant to the Endangered Species Act shall be deemed to be a threatened species under this chapter. The department may determine, in accordance with this section, however, that any such threatened species is an endangered species throughout all or any portion of the range of such species within this State.

(b) In addition to the species that have been determined to be endangered or threatened pursuant to the Endangered Species Act, the department, by rules adopted pursuant to chapter 91, may determine any indigenous species of aquatic life, wildlife, or land plant to be an endangered species or a threatened species because of any of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Overutilization for commercial, sporting, scientific, educational, or other purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or artificial factors affecting its continued existence within Hawaii.

(c) The department shall make determinations required by subsection (b) on the basis of all available scientific, commercial, and other data after consultation, as appropriate, with federal agencies, other interested state and county agencies, and interested persons and organizations.

(d) The department shall issue rules containing a list of all species of aquatic life, wildlife, and land plants that have been determined, in accordance with subsections (a) to (c), as endangered species and a list of all such species so designated as threatened species. Each list shall include the scientific, common, and Hawaiian names, if any, and shall specify with respect to each such species over what portion of its range it is endangered or threatened.

Except with respect to species of aquatic life, wildlife, or land plants determined to be endangered or threatened pursuant to the Endangered Species Act, the department, upon its own recommendation or upon the petition of three interested persons who have presented to the department substantial evidence that warrants review, shall conduct a review of any listed or unlisted indigenous species proposed to be removed from or added to the lists published pursuant to this subsection.

(e) With respect to any threatened or endangered species of aquatic life, wildlife, or land plant, it is unlawful, except as provided in subsections (f), (g), and (j) for any person to:

(1) Export any such species from this State;

(2) Take any such species within this State;

(3) Possess, process, sell, offer for sale, deliver, carry, transport, or ship, by any means whatsoever, any such species;

(4) Violate any rule pertaining to the conservation of the species listed pursuant to this section and adopted by the department pursuant to this chapter; or

(5) Violate the terms of, or fail to fulfill the obligations imposed and agreed to under, any license issued under subsection (f), (g), or (j) any habitat conservation plan authorized under section 195D-21, or any safe harbor agreement authorized under section 195D-22.

(f) The department may issue temporary licenses, under such terms and conditions as it may prescribe, to allow any act otherwise prohibited by subsection (e), for scientific purposes or to enhance the propagation or survival of the affected species.

(g) After consultation with the endangered species recovery committee, the board may issue a temporary license as a part of a habitat conservation plan to allow a take otherwise prohibited by subsection (e) if the take is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity; provided that:

(1) The applicant, to the maximum extent practicable, shall minimize and mitigate the impacts of the take;

(2) The applicant shall guarantee that adequate funding for the plan will be provided;

(3) The applicant shall post a bond, provide an irrevocable letter of credit, insurance, or surety bond, or provide other similar financial tools, including depositing a sum of money in the endangered species trust fund created by section 195D-31, or provide other means approved by the board, adequate to ensure monitoring of the species by the State and to ensure that the applicant takes all actions necessary to minimize and mitigate the impacts of the take;

(4) The plan shall increase the likelihood that the species will survive and recover;

(5) The plan takes into consideration the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed;

(6) The measures, if any, required under section 195D-21(b) shall be met, and the department has received any other assurances that may be required so that the plan may be implemented;

(7) The activity, which is permitted and facilitated by issuing the license to take a species, does not involve the use of submerged lands, mining, or blasting;

(8) The cumulative impact of the activity, which is permitted and facilitated by the license, provides net environmental benefits; and

(9) The take is not likely to cause the loss of genetic representation of an affected population of any endangered, threatened, proposed, or candidate plant species.

Board approval shall require an affirmative vote of not less than two-thirds of the authorized membership of the board after holding a public hearing on the matter on the affected island. The department shall notify the public of a proposed license under this section through publication in the periodic bulletin of the office of environmental quality control and make the application and proposed license available for public review and comment for not less than sixty days prior to approval.

(h) Licenses issued pursuant to this section may be suspended or revoked for due cause, and if issued pursuant to a habitat conservation plan or safe harbor agreement, shall run with the land for the term agreed to in the plan or agreement and shall not be assignable or transferable separate from the land. Any person whose license has been revoked shall not be eligible to apply for another license until the expiration of two years from the date of revocation.

(i) The department shall work cooperatively with federal agencies in concurrently processing habitat conservation plans, safe harbor agreements, and incidental take licenses pursuant to the Endangered Species Act. After notice in the periodic bulletin of the office of environmental quality control and a public hearing on the islands affected, which shall be held jointly with the federal agency, if feasible, whenever a landowner seeks both a federal and a state safe harbor agreement, habitat conservation plan, or incidental take license, the board, by a two-thirds majority vote, may approve the federal agreement, plan, or license without requiring a separate state agreement, plan, or license if the federal agreement, plan, or license satisfies, or is amended to satisfy, all the criteria of this chapter. All state agencies, to the extent feasible, shall work cooperatively to process applications for habitat conservation plans and safe harbor agreements on a consolidated basis including concurrent processing of any state land use permit

application that may be required pursuant to chapter 183C or 205, so as to minimize procedural burdens upon the applicant.

(j) Subsection (e) and any other provision of law to the contrary notwithstanding, the department shall adopt rules in accordance with chapter 91 authorizing the propagation, possession, ownership, and sale of selected endangered and threatened land plant species grown from cultivated nursery stock and not collected or removed from the wild. [L 1975, c 65, pt of §1; am L 1983, c 111, §5; am L 1997, c 380, §4 and c 381, §2; am L 1998, c 237, §1; am L 2004, c 144, §2]

HRS § 195D-21

Habitat conservation plans. (a) The department may enter into a planning process with any landowner for the purpose of preparing and implementing a habitat conservation plan. An agreement may include multiple landowners. Applications to enter into a planning process shall identify:

(1) The geographic area encompassed by the plan;

(2) The ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;

(3) The endangered, threatened, proposed, and candidate species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;

(4) The measures or actions to be undertaken to protect, maintain, restore, or enhance those ecosystems, natural communities, or habitat types within the plan area;

(5) A schedule for implementation of the proposed measures and actions; and

(6) An adequate funding source to ensure that the proposed measures and actions are undertaken in accordance with the schedule.

After a habitat conservation plan is prepared, the board shall notify the public of the proposed habitat conservation plan through the periodic bulletin of the office of environmental quality control and make the proposed plan and the application available for public review and comment not less than sixty days prior to approval. The notice shall include, but not be limited to, identification of the area encompassed by the plan, the proposed activity, and the ecosystems, natural communities, and habitat types within the plan area. The notice shall solicit public input and relevant data.

(b) (1) Except as otherwise provided by law, the board, upon recommendation from the department, in cooperation with other state, federal, county, or private organizations and landowners, after a public hearing on the island affected, and upon an affirmative vote of not less than two-thirds of its authorized membership, may enter into a habitat conservation plan, if it determines that:

(A) The plan will further the purposes of this chapter by protecting, maintaining, restoring, or enhancing identified ecosystems, natural communities, or habitat types upon which endangered, threatened, proposed, or candidate species depend within the area covered by the plan;

(B) The plan will increase the likelihood of recovery of the endangered or threatened species that are the focus of the plan; and

(C) The plan satisfies all the requirements of this chapter.

In the event the board votes to enter into a habitat conservation plan for which the majority of the endangered species recovery committee recommended disapproval, the board may not enter into the habitat conservation plan unless the plan is approved by a two-thirds majority vote of both

houses of the legislature. Habitat conservation plans may allow conservation rental agreements, habitat banking, and direct payments. Any habitat conservation plan approved pursuant to this section shall be based on the best available scientific and other reliable data available at the time the plan is approved.

(2) Each habitat conservation plan shall:

(A) Identify the geographic area encompassed by the plan; the ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan; and the endangered, threatened, proposed, and candidate species known or reasonably expected to be present in those ecosystems, natural communities, or habitat types in the plan area;

(B) Describe the activities contemplated to be undertaken within the plan area with sufficient detail to allow the department to evaluate the impact of the activities on the particular ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;

(C) Identify the steps that will be taken to minimize and mitigate all negative impacts, including without limitation the impact of any authorized incidental take, with consideration of the full range of the species on the island so that cumulative impacts associated with the take can be adequately assessed; and the funding that will be available to implement those steps;

(D) Identify those measures or actions to be undertaken to protect, maintain, restore, or enhance the ecosystems, natural communities, or habitat types within the plan area; a schedule for implementation of the measures or actions; and an adequate funding source to ensure that the actions or measures, including monitoring, are undertaken in accordance with the schedule;

(E) Be consistent with the goals and objectives of any approved recovery plan for any endangered species or threatened species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;

(F) Provide reasonable certainty that the ecosystems, natural communities, or habitat types will be maintained in the plan area, throughout the life of the plan, in sufficient quality, distribution, and extent to support within the plan area those species typically associated with the ecosystems, natural communities, or habitat types, including any endangered, threatened, proposed, and candidate species known or reasonably expected to be present in the ecosystems, natural communities, or habitat types within the plan area;

(G) Contain objective, measurable goals, the achievement of which will contribute significantly to the protection, maintenance, restoration, or enhancement of the ecosystems, natural communities, or habitat types; time frames within which the goals are to be achieved; provisions for monitoring (such as field sampling techniques), including periodic monitoring by representatives of the department or the endangered species recovery committee, or both; and provisions for evaluating progress in achieving the goals quantitatively and qualitatively; and

(H) Provide for an adaptive management strategy that specifies the actions to be taken periodically if the plan is not achieving its goals.

(c) The board shall disapprove a habitat conservation plan if the board determines, based upon the best scientific and other reliable data available at the time its determination is made, that the cumulative activities, if any, contemplated to be undertaken within the areas covered by the plan are not environmentally beneficial, or that implementation of the plan:

(1) Is likely to jeopardize the continued existence of any endangered, threatened, proposed, or candidate species identified in the plan area;

(2) Is likely to cause any native species not endangered or threatened at the time of plan submission to become threatened or endangered;

(3) Fails to meet the criteria of subsections (a) and (b); or

(4) Fails to meet the criteria of section 195D-4(g).

The habitat conservation plan shall contain sufficient information for the board to ascertain with reasonable certainty the likely effect of the plan upon any endangered, threatened, proposed, or candidate species in the plan area and throughout its habitat range.

(d) Notwithstanding any other law to the contrary, the board shall suspend or revoke the approval of any habitat conservation plan approved under this section if the board determines that:

(1) Any parties to the plan, or their successors, have breached their obligations under the plan or under any agreement implementing the plan and have failed to cure the breach in a timely manner, and the effect of the breach is to diminish the likelihood that the plan will achieve its goals within the time frames or in the manner set forth in the plan;

(2) The plan no longer has the funding source specified in subsection (a) or another sufficient funding source to ensure the measures or actions specified in subsection (b) are undertaken in accordance with this section; or

(3) Continuation of the permitted activity would appreciably reduce the likelihood of survival or recovery of any threatened or endangered species in the wild.

(e) The rights and obligations under any habitat conservation plan shall run with the land and shall be recorded by the department in the bureau of conveyances or the land court, as may be appropriate.

(f) Participants in a habitat conservation plan shall submit an annual report to the department within ninety days of each fiscal year ending June 30, that includes a description of activities and accomplishments, analysis of the problems and issues encountered in meeting or failing to meet the objectives set forth in the habitat conservation plan, areas needing technical advice, status of funding, and plans and management objectives for the next fiscal year, including any proposed modifications thereto. [L 1997, c 380, pt of §2; am L 1998, c 237, §2; am L 2003, c 35, §4; am L 2004, c 10, §6]

HRS § 195D-25

Endangered species recovery committee. (a) There is established within the department for administrative purposes only, the endangered species recovery committee, which shall serve as a consultant to the board and the department on matters relating to endangered, threatened, proposed, and candidate species. The committee shall consist of two field biologists with expertise in conservation biology, the chairperson of the board or the chairperson's designee, the ecoregion director of the United States Fish and Wildlife Service or the director's designee, the director of the United States Geological Survey, Biological Resources Division or the director's designee, the dean of the University of Hawaii at Manoa college of natural sciences or the dean's designee, and a person possessing a background in native Hawaiian traditional and customary practices, as evidenced by:

(1) A college degree in a relevant field, such as Hawaiian studies, native Hawaiian law, native Hawaiian traditional and customary practices, or related subject area;

(2) Work history that demonstrates an appropriate level of knowledge in native Hawaiian traditional and customary practices; or

(3) Substantial experience in native Hawaiian traditional and customary practices.

Nongovernmental members shall be appointed by the governor pursuant to section 26-34. Nongovernmental members shall not serve for more than two consecutive terms. Nongovernmental members shall serve for four-year staggered terms, except that one of the members first appointed shall serve for two years.

Governmental members from the federal agencies are requested but not required to serve on the committee. The ability of the committee to carry out its functions and purposes shall not be affected by the vacancy of any position allotted to a federal governmental member.

(b) The endangered species recovery committee shall:

(1) Review all applications and proposals for habitat conservation plans, safe harbor agreements, and incidental take licenses and make recommendations, based on a full review of the best available scientific and other reliable data and at least one site visit to each property that is the subject of the proposed action, and in consideration of the cumulative impacts of the proposed action on the recovery potential of the endangered, threatened, proposed, or candidate species, to the department and the board as to whether or not they should be approved, amended, or rejected;

(2) Review all habitat conservation plans, safe harbor agreements, and incidental take licenses on an annual basis to ensure compliance with agreed to activities and, on the basis of any available monitoring reports, and scientific and other reliable data, make recommendations for any necessary changes;

(3) Consider and recommend appropriate incentives to encourage landowners to voluntarily engage in efforts that restore and conserve endangered, threatened, proposed, and candidate species;

(4) Perform such other duties as provided in this chapter;

(5) Consult with persons possessing expertise in such areas as the committee may deem appropriate and necessary in the course of exercising its duties; and

(6) Not conduct more than one site visit per year to each property that is the subject of a habitat conservation plan or safe harbor agreement. [L 1997, c 380, pt of §2; am L 1998, c 237, §4; am L 2003, c 35, §7; am L 2014, c 53, §1; am L 2016, c 257, §1]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served electronically (through the Court's JEFS system), or conventionally via US Mail, upon the following parties:

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DATED: Honolulu, Hawai‘i, December 30, 2019.

/s/ Ewan C. Rayner
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Deputy Solicitor General

Counsel for Appellees BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, and SUZANNE D. CASE in her official capacity as Chairperson of the Board of Land and Natural Resources